

NO. 3427.

UNITED STATES
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

PABST BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a corporation,
Defendant in Error.

**BRIEF FOR PLAINTIFF IN ERROR, PABST
BREWING COMPANY.**

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STATEMENT OF CASE.

This action was originally brought by the E. Clemens Horst Company, a New Jersey corporation, hereinafter called the "Horst Company," against Pabst Brewing Company, a Wisconsin corporation engaged in the manufacture of beer at Milwaukee, and hereinafter called the "Pabst Company," to recover general damages alleged to have been sustained as the result of the claimed refusal of the Pabst Company to perform a contract for the purchase of 2,000 bales of hops from the Horst Company.

The case was originally tried by a jury and a verdict returned in favor of the Horst Company upon which judgment was entered.

On error to this court the issues involved were defined and discussed and various rulings of the trial court condemned and the judgment reversed. (See 229 Fed. Rep. 913.)

On retrial a jury was waived. The trial court made findings of fact in favor of the Horst Company and judgment was entered against the Pabst Company for \$30,902.68 damages, interest and costs.

It is to review this judgment that error is brought.

The essential facts necessary for an understanding of the errors relied upon are as follows:

The Horst Company is the owner of a hop ranch of about 400 acres in the Consumnes river district in Sacramento County. The entire Consumnes district consists of about 800 or 900 acres.

The Consumnes hops are comparable with hops grown in certain other regions on the Pacific Coast.

The method of marketing these hops is somewhat distinctive. All sales are made by salesmen traveling around among the brewers and by private solicitation. (See testimony of E. Clemens Horst, R. p. 47.) Such hops are not handled in the manner common to other commodities which are shipped to depots or storage warehouses in various parts of the country and sold from time to time to meet the demands of the community tributary to such depot or warehouse.

In the month of August, 1911, the Horst Company made a contract by wire with the Brewing Company for the sale of 2,000 bales of *choice air-dried Consumines hops* of the 1912 crop at 20c per pound delivered at Milwaukee, the purchaser in addition thereto paying the freight from Coast.

On November 4, 1912, the Pabst Company declared that the hops which the Horst Company proposed to deliver and samples of which were exhibited were not of the quality specified in the contract. Thereupon this action was commenced.

THE FINDINGS OF THE COURT BELOW.

The lower court held against the contention of the Pabst Company that the contract of August, 1911, was thereafter changed and held against its further contention that the hops tendered by the Horst Company through exhibition of samples were not of the quality called for by the contract. Although we believe the greater weight of the evidence is against these findings we do not seek to have them reviewed because we believe it can be demonstrated that the two further findings to be presently mentioned are so hostile to all of the credible evidence that the judgment under review must be reversed or at least reduced to a nominal sum. The two findings which we assail as unsupported by and opposed to all of the credible evidence are:

(1). The trial court found that the market value of the hops at the time and place of delivery was 6c per

pound under the contract price or 14c at Milwaukee, plus freight. This was the market price which the court fixed for comparison with the contract price as the basis for computing damages. (Finding VII, R. pp. 20, 21.)

(2). Pursuant to the determination of this court in 229 Fed. Rep. 913 that the ability of the Horst Company to perform was one of the issues precedent to recovery by that Company the lower court determined that the Horst Company was ready, able and willing to deliver hops of the quantity and quality specified in the contract. (Finding IV, R. p. 20.)

The two fundamental errors now urged relate to the insufficiency of the evidence to support these two findings. Errors in rulings on evidence relate only to evidence affecting these findings.

ERRORS RELIED UPON.

(Specification of Errors.)

The court erred:—

(1). In finding that the market price of hops of the quality specified in the contract at the time and place of delivery was 6c per pound under the contract price because such finding is against all the credible evidence and is not sustained by the evidence. (Assignment of errors 17, 19, 20, 22, 23, 30 and 31; R. pp. 242, 243, 244 and 251.)

(1a). In permitting the witness George to describe the depressing effect upon the price at Mil-

waukee of attempting to sell so large a quantity as 2,000 bales of hops. (Assignment of error 48; R. p. 257.)

(1b). In refusing to permit the Pabst Company to cross-examine the witness George as to the value of Oregon hops which were shown by the testimony to command substantially the same market price as Consumnes hops, thereby permitting the witness to base his opinion of market price at Milwaukee upon the sale of a comparatively small quantity of Consumnes hops at a point very remote from Milwaukee. (Assignment of error 49; R. p. 258.)

(1c). In sustaining the Horst Company's objection to the question propounded by the Pabst Company to the witness George for the purpose of ascertaining whether or not the small quantity of hops sold by the witness to the Narragansett Brewing Company for 16c per pound was of the same quality as large quantities of Consumnes and other Pacific Coast hops then being sold at from 22c to 24c per pound. (Assignment of error 50; R. p. 258.)

(2). In finding that the Horst Company was ready, able and willing to perform the contract mentioned in the findings. (Assignment of errors 4, 6, 7, 8, 10, 14, 15; R. p. 240, 241, 242.)

(2a). In denying the defendant's motion to strike out the testimony of the witness Horst predi-

cated upon books which were not produced and the absence of which was unexplained, to the effect that the Horst Company had 2,000 bales of hops on hand on November 4, 1912, on the Coast, for the reason that the incompetency of such evidence was determined by the decision in 229 Fed. Rep. 913 and such evidence was not the best evidence and was hearsay. (Assignment of error 52; R. p. 259.)

BRIEF OF THE ARGUMENT.

We will discuss only the two basic propositions above mentioned, considering in connection with each of such two propositions the rulings upon evidence affecting the respective findings challenged.

FIRST.

The finding that the market price of hops of the quality specified in the contract at the time and place of delivery was 6c lower than the contract price is unsupported by competent evidence. The court here considered certain incompetent evidence. All of the competent evidence, and it is voluminous, shows the market price at the time and place of delivery to have been at least equal to the contract price.

Starting with the rule which must be kept constantly in mind that the purpose of the law in awarding damages is to afford compensation, no more and no

less, to the injured party, we approach the application of such rule to the facts of this case. Upon review of the result of the first trial this court held:

“In this case the measure of damages was the difference between the contract price and the market price at the time and place of delivery, because there was no allegation in the complaint that the hops were resold, or of the price at which they were resold.” (229 Fed. Rep. 917.)

The court further held:

“The only purpose of fixing the date of delivery would be to fix a date for the ascertainment of the market price, and under the circumstances of this case that date should be fixed as of November 4, 1912, or soon thereafter.” (229 Fed. Rep. 919.)

The propositions quoted are obviously right, but whether right or wrong they are the law of the case.

4 Corpus Juris 1213;

National Surety Co. vs. Kansas City Hydraulic Brick Co., 182 Fed. 54;

Columbia Chemical Co. vs. Duff, 184 Fed. 876;

U. S. vs. Axman, 193 Fed. 644.

The facts now presented by the record must be considered in light of these fixed rules.

It is necessary to consider the evidence on market price with reference to the state of completion of the raw material. It appears that the price received by the grower from the dealer or sales agency acting as an

intermediary was from 1c to 2c per pound less than the price paid by the brewers, exclusive of freight, who, like the plaintiff in error, were the consumers of the hops. (R. pp. 195, 208; Horst 58-60; also R. pp. 175-133-144-175-195-208-229.) In other words, the expense of maintaining and operating sales organizations for soliciting orders from brewers was an additional cost included in the price of the product and corresponded to one of the processes through which the raw material passed up to the time it was offered to the brewers. The Horst Company, in selling to the Pabst Company, would have incurred this additional expense. It is, therefore, the market established by sales to brewers which must afford the criterion in this case. Had the Pabst Company been sustained in its contention that the Horst Company defaulted in refusing to deliver hops corresponding to the quality specified by the contract the market price at the time and place of delivery to which the Pabst Company's damages in such event would have been referable would, necessarily, be *the market as fixed by sales to consumers*.

To fix damages by comparing the contract price specified in a contract made upon the solicitation of a brewer's order with a market price determined not by sales to brewers but by the net price received by the growers on the Coast involves a duplication of damages.

Such a process, in effect, uses as a basis for damages a comparison between the contract price for a commodity at an advanced state of completion with the

market price of the same commodity in an earlier state of completion and when important expenditures necessary to bring the commodity to its final stage have not been made. In other words, it compares the contract price of one thing with the market price for a substantially different thing. It gives to the seller not only compensation but rewards him in addition with a part of the cost of manufacture of the commodity involved.

In considering the evidence we shall, therefore, deal with the market as fixed by sales to brewers.

Under the decision in 229 Fed. Rep. we shall necessarily deal with the market price at the time and place of delivery. We shall deal with the market price of Consumnes hops regardless of whether the same are air-dried (229 Fed. Rep. 919) and we shall consider the market price of other Pacific Coast hops of equal quality where the undisputed evidence shows that the market value of such hops is the same as that of Consumnes. (229 Fed. Rep. 919-920.)

It is, of course, apodeictical that mere opinion evidence as to the market price of hops at a given place is of no probative force if it is not predicated upon actual sales. This is especially true where evidence of the price governing many actual sales of substantial quantities is presented.

Primarily, therefore, the most conclusive and convincing evidence should be that of sales made at Milwaukee on or about November 4, 1912. The hops in question and other similar hops are the product of a

limited geographical region. No independent markets exist in which prices vary according to the adequacy or inadequacy of the supply accumulated in depots or warehouses at distributing points remote from the Pacific Coast when related to the demands of the district supplied by such depots or warehouses. The entire market is referable to the Pacific Coast market as a basis plus freight. (R. 175, 209, 229.) In this connection it is to be noted that the contract price is fixed at 20c per pound *plus freight*.

Another legitimate method of showing the market price at Milwaukee would be by showing the market price in Chicago, a large metropolis close thereto, in which, at the time in question, many sales of large quantities of hops were made. Such evidence would not be for the purpose of predicating damages upon the price obtaining in the Chicago market but for the purpose of ascertaining the true Milwaukee market.

In *National Warehouse & S. Co. vs. Toomey, et al.* (Mo.) 129 S. W. 423, the court said:

“But the damages are not necessarily measured by the market price at the place of delivery, for if there is no market for the article at the place of delivery, the market price *at the nearest and most available market* would determine the measure of damages.”

We will briefly review all of the evidence of actual sales at Milwaukee, at Chicago (the nearby metropolis) and on the Pacific Coast where all hops of like quality

were grown and where the base market price was fixed.

It is of the utmost importance in reviewing the prices at which actual transfers occurred to understand the quality of hops specified by the contract. In the first place it is undisputed that all choice Pacific Coast hops, whether they were Consumnes, Mendocinos or Sonomas, were of substantially equal value and commanded the same market. (R. pp. 190, 194, 204, 234; bottom of R. p. 200.)

It is undisputed that *choice* hops, as specified in the contract, indicates the highest grade so that in reviewing sales made it must be borne in mind that such sales could not possibly have been of a better quality of hops than that specified in the contract, except that so-called "strictly choice" hops, the superlative grade, were about 1c higher. (R. p. 194.) Actual sales of Pacific Coast hops, therefore, in Milwaukee, Chicago or on the Coast, could not have involved hops of a more valuable quality than that specified in the contract.

SALES IN MILWAUKEE.

The witnesses to market value called on behalf of the plaintiff were, at most, three,—Mr. E. Clemens Horst, who testified to no sales at Milwaukee or even at Chicago or any other nearby point, and who testified as follows:

"Q. You kept track of the entire market during November, 1912, did you?"

A. Well, I kept track of the market, yes, but I don't know—I knew it at the time, *but I don't know now.*" (R. p. 62.)

In *United States vs. Baxter*, 46 Fed. 350, at page 351, where a witness had previously testified that he did not know the market value of the timber in question, and he was then asked about his best recollection as to what the price was, the court held:

"To allow a witness to testify as to value of property, he should have some knowledge of the value of the same either from the market price or the selling price of the same. * * * *A man's recollection of value of property is a poor criterion to guide a jury in estimating damages.* A man's best recollection is a very indefinite matter. It might amount to so little as to be entirely worthless for any practical purposes, or to influence a business man in arriving at any reasonable conclusion in any business transaction. For these reasons I think it was error to allow the witness to answer the question asked."

Mr. Horst further testified that he commenced preparing for this action before he commenced even the picking of hops. (R. p. 67.) Such picking commenced August 12, 1912. (R. p. 102.)

The next witness for the plaintiff was F. W. George, an employee of the Horst Company, who helped in the preparation of its case, and a cousin of Hr. Horst's wife and an intimate friend of Mr. Horst. (R. p. 99.) This witness testified to no sale at Milwaukee or Chicago and

predicated his testimony solely upon a single sale of a comparatively small quantity of hops made by him for the Horst Company to the Narragansett Brewing Company, at Providence, in the State of Rhode Island. (R. pp. 97, 99.) (The Rhode Island residence of the purchaser is indicated at the bottom of R. p. 67.) This witness further testified:

“Q. Mr. George, do you know of any sales *in or about Milwaukee* on November 4, or thereabouts, in 1912?

A. No.” (Bottom of R. p. 96.)

The final witness called by the plaintiff on this issue was Flood V. Flint, of Sacramento City, who testified:

“The price in Milwaukee is based on the price here, plus freight.” (R. p. 272.)

He further testified with reference to sales in November, 1912:

“I don’t know of any that were sold at that time in Milwaukee. I did not sell any in Milwaukee.” (R. p. 273.)

His testimony was not predicated upon any sale whatever but upon offers made to growers on the Coast which were below the point at which sales could be induced. He testified as follows:

“Q. Have you any recollection of any sales of Consumnes hops of purchases in the months of November and December, 1912?

A. *I have not them in mind now; I cannot recall them.*

Q. What do you base your estimate on, then?

A. I can recall that *we had offers of 12 cents* and in the ordinary daily business we offered according to our instructions, but I cannot remember any distinct ones." (R. p. 274.)

Such is the essence of the Horst Company's testimony concerning sales at Milwaukee. Not one of its witnesses testified to a single sale, large or small, either in Milwaukee or Chicago. The opinion evidence of these witnesses as to the Milwaukee market was worthless because predicated upon no sales whatsoever in Milwaukee, Chicago or on the Pacific Coast. The witness Flood V. Flint, disregarding the fact that large quantities of Coast hops were actually sold in Milwaukee, Chicago and upon the Coast during November, 1912, expressly based his entirely worthless guess upon unaccepted offers made to growers in the Coast district.

Undisputed evidence offered by the Pabst Company showed a large number of sales covering substantial quantities at Milwaukee during the month of November. The Pabst Company, after refusing to permit the Horst Company to deliver hops no better in quality than the samples of hops which it proposed to deliver, purchased the following hops:

November 4, 1912, 332 bales Pacific Coast hops 22c less freight. (R. p. 174.)

November 14, 1912, 93 bales 22c delivered.

November 14, 1912, 89 bales 22c delivered.

November 21, 1912, 250 bales 22c delivered.

November 25, 1912, 100 bales 21c delivered.

November 25, 1912, 156 bales 23c delivered.

November 25, 1912, 100 bales 22c delivered.

December 24, 1912, 80 bales 23c delivered. (R. pp. 170, 171, 172.)

The total of these sales is large, amounting to 1,020 bales, and the average price substantially the same as the contract price. (Note—The 13 bales shown at record page 171 is a misprint as is indicated by the poundage and total purchase price.)

SALES AT CHICAGO.

Market value at Chicago is the same as at Milwaukee. (Testimony of Horst, R. p. 50.)

The Pabst Company offered the testimony of M. D. Wormser, vice-president of Falk-Wormser & Company, dealers in hops and brewers' supplies in Chicago, who sold from eight to ten thousand bales of hops in 1912. (R. p. 187.) This witness testified as follows:

"I have been in business for fifteen years and am familiar with the market value of hops in Milwaukee. Milwaukee is eighty-five miles from Chicago. *The Chicago market for hops of the character of Consumnes is the same as the Milwaukee market.* I know the Consumnes hops grown in California. The reasonable market price in Milwaukee of strictly choice Consumnes hops on November 4th, 1912, or thereabouts, was from twenty-two to twenty-four cents a pound. (R. p. 186.)

Consumnes, Russian River, Mendocino, Sonoma and American River hops *are the same general type*, and were about the same as Consumnes." (R. p. 190.)

Horst Company's counsel offered in evidence a letter written by Mr. M. N. Falk, evidently in response to an inquiry as to what the market price of hops had been during a certain period of years. That communication in part reads: (R. p. 189.)

"I have taken pains to look up our records and herewith give you the following details which are bona fide. * * * According to our sales-book the selling price of *prime to choice* hops during:

November, 1910, averages about 16c per pound.

November, 1911, averages about 45c per pound.

November, 1912, averages about 23c per pound.

November, 1913, averages about 26c per pound.

November, 1914, averages about 14c per pound.

These figures are as nearly accurate as we can possibly give them to you. * * *"

Mark J. Murphy, called on behalf of the Pabst Company, testified as follows:

"I am the office manager for Falk-Wormser & Company and have been for thirteen years. (R. p. 193.)

The market in Milwaukee for hops is the same as at Chicago. There is no difference in the sale price of Pacific Coast hops in Milwaukee from Chicago. (R. p. 193.)

I have been familiar with the market value of hops in Milwaukee and Chicago markets for thirteen years. (R. p. 193.)

In looking over my books I note that year (1912), I think the price of Consumnes and Sonomas was about the same price. *I kept the records of what we bought and sold* and was familiar with the market of Consumnes hops and all hops of the character of Consumnes. (R. p. 194.)

The price between dealer and dealer and the price between dealer and brewer differed. There is an advance to the brewer generally. (R. p. 195.)

In the year 1912 our firm sold from ten to twelve thousand bales of hops. (R. p. 195.)

My firm sold 889 bales of Pacific Coast hops in November, 1912. I got these figures from my books. The delivery price ranges from eighteen cents a pound to twenty-five and one-fourth cents a pound. The twenty-five and one-fourth cent price is on one five bale lot. With that exception the highest price is twenty-four cents. (R. p. 199.)

With reference to the sales made by us in November, there was one lot which we sold at eighteen cents, that were not choice. (R. p. 200.) I know of my own knowledge that the 118 bales that were sold by my firm for eighteen cents a pound were not choice. I know this from the time of the purchase and the sample number that is referred to at the time. (R. p. 201.)

In November we sold choice hops as follows:

November	2nd,	15 bales at 24c.
November	6th,	10 bales at 22c.
November	7th,	25 bales at 22c.
November	8th,	244 bales at 22c.
November	10th,	10 bales at 22½c.
November	11th,	25 bales at 23c.
November	12th,	10 bales at 24c.
November	19th,	104 bales at 22c.
November	22d,	22 bales at 23c.
November	23d,	50 bales at 24c.
November	25th,	25 bales at 23c.
November	25th,	25 bales at 23½c.
November	26th,	25 bales at 25¼c.
November	27th,	15 bales at 23c.

(R. p. 200.)

Probably one-half of our hops are sold as Pacific Coast hops, and with reference to these Pacific

Coast hops, could be Consumnes, Mendocino or Sonomas. There would be no difference provided they were choice." (R. p. 200.)

G. G. Schumacher's deposition was taken by the Pabst Company, and he testified as follows:

"I am the secretary and treasurer of A. Magnus & Company, who are engaged at Chicago in the general brewer's supply business. I have been connected with this firm for thirty-five years and have bought and sold hops during that period. I am familiar with the market in Chicago and vicinity, including Milwaukee. *There is no difference in the market price of hops in Chicago and Milwaukee.* (R. p. 202.)

The market price of strictly choice Consumnes hops in Milwaukee on November 4th, 1912, and thereafter for the next few weeks was about twenty-three cents, and *for choice twenty-two cents.* There was a fairly active market at that time. I base the price of choice Consumnes hops on the price of choice Oregons and choice Sonomas. (R. p. 203.)

Consumnes were close to the price of Oregons and Sonomas in 1912. The Pacific Coast hops during that month were selling from twenty-two and one-half cents to twenty-four cents. I am testifying both on the basis of my sales and the reports of the 'Brewer's Daily Bulletin.' The highest price that I secured for any Pacific Coast hops during that time was twenty-four and one-half cents, and the lowest price of *choice hops* during that month was twenty-two and one-half cents. (R. p. 204.)

We sell from eight to ten thousand bales a year. The season is short. It opens up in October and about February or March it is about over with." (R. p. 205.)

It will therefore be observed that the witnesses' knowledge of market value was predicated *upon actual sales* made in the month of November, 1912. The Chicago transactions detailed by these witnesses demonstrate that the prices hereinbefore set forth and which were recognized in the actual sales at Milwaukee in November, 1912, coincided with the true market price.

Upon the taking by the Pabst Company of the deposition of Rudolph Keitel there were offered in evidence extracts showing market quotations in November, 1912, on Pacific Coast hops from the "Brewer's Daily Bulletin," of which the witness was the editor and publisher.

This witness testified as follows:

"We got the information concerning hops that appeared in the bulletin from the brewers who are the consumers of hops and the dealers in hops. During 1912 it was a *daily publication*. The circulation covers the brewers and the allied trades in the United States from coast to coast. The statements contained in my paper are accepted by the trade as facts. The statements were truthful statements. (R. p. 210.)

We never at any time during the month of November, 1912, had any person connected with the trade inform us that any figures given by us were incorrect. (R. p. 212.)

When we go around to these hop men to get information they show us telegrams and letters from the Pacific Coast, and from that stuff we compile the gossipy part of the hop market report just as carefully and just as accurately as the remainder of it. (R. p. 220.)

The prices set forth in our paper were the prices a man reasonably desirous of buying would pay to a man reasonably desirous of selling. (R. p. 224.)

There are many transactions of which I naturally knew about.

Q. Were these transactions used in your paper or not?

A. They were reflected in the quotations, naturally. *I have been present at times when the transactions have taken place.* I have seen contracts signed—have seen telegrams of confirmation, but I cannot say whether they took place in any one of these particular days. That is a long time ago, but I mean that in my course of business I see these things. (R. p. 227.)

If there was no demand for several days or a brewer comes along and says: 'I will buy for a cent less,' or if the market begins to change because of some sale or because of the lowering in the asking price, or something like that, then I change my quotations in my papers, and *in that way the data published in the Brewer's Bulletin* was based upon the information obtained from transactions, although there may have been no sale on that particular day. (R. p. 228.)

The circulation of my paper has increased all the time."

That these market reports contained in the "Brewer's Daily Bulletin" were considered reliable by the trade whose acts were governed by the accuracy of its quotations, is to be noted from what the large dealers and brewers generally thought of these publications.

W. D. Wormser testified:

"I am familiar with the various trade journals which were current in November, 1912. The prices

that were quoted in these papers for hops were accepted by the trade in Chicago and vicinity, including Milwaukee, as the current market price of hops. *They were authentic and accepted by the trade as reliable.* (R. p. 187.)

They gave their prices based on facts. (R. p. 191.)

The brewers and salesmen of hops referred to those trade journals for current prices, and the prices in those journals are accepted by brewers as being approximately correct." (R. p. 192.)

Mark J. Murphy testified:

"I am familiar with the trade journal known as the 'Brewer's Daily Bulletin.' It is generally relied upon and the prices quoted in that paper are generally accepted by the trade as being accurate and correct. I have found the quotations given in that paper reliable and they are generally so regarded by the trade and the prices therein quoted were accepted in 1912 by people buying and selling hops as being reliable quotations, generally speaking. (R. p. 194, 195.)

The journals secure their information and publish the range of prices, whatever it was, as an interpretation of the facts which were reported to them by the dealer. (R. p. 197.)

I keep track of the records in the prices of this daily trade journal in my business and the *information therein contained* is correct with reference to the matters that I know of myself. *In the month of November, 1912, the transactions that I knew about that were therein reported were correct.* They quoted the prices that we gave them. They took the prices that we gave them, confirmed it by other dealers and correctly recorded the prices which they got from us and other dealers. (R. p. 198.)

When I said the paper interpreted the prices I meant they took the prices from one dealer and confirmed it by the other hop dealers." (R. p. 198.)

G. G. Schumacher testified:

"I have furnished information to that paper ('Daily Brewer's Bulletin') almost daily, and I subsequently check over the records made by that paper as to the information given them by me by means of reading the bulletin. They not only publish the information we gave them but the information they get from others. The information as I gave it to them *came out accurate as to the prices quoted* and the trade usually accepted the figures as given them by this paper as being accurate." (R. p. 203.)

Charles Zaumeyer, the hop buyer for the Pabst Company for twenty-two years, also placed reliance upon market reports in arriving at his opinion on market values. (R. p. 179.)

Horst Company's witness, F. W. George, testified that although he regarded prices given by market reports as unreliable, he kept abreast of the market quotations and read the "Brewer's Bulletin" under hops and was familiar at the time with the quotations contained therein. (R. p. 98.)

MARKET REPORTS AS EVIDENCE.

It is a rule recognized generally that market reports or quotations as contained in newspapers, trade jour-

nals, trade circulars and price lists are competent evidence of the state of the market.

Cliquot's Champagne, 3 Wall. (U. S.) 114,
18 (U. S. L. ed.) 116;

Vogt vs. Cope, 66 Calif. 31;

Hudson vs. N. Pac. Rd. Co. (Ia.) 60 N. W.
608;

Sisson vs. Cleveland, etc., Rd. Co., 14 Mich.
489, 90 American Dec. 252;

American & English Ann. Cases, Vol. 12,
page 127.

In *Sisson vs. Cleveland, etc., Rd. Co.*, *supra*, a case extensively quoted, Judge Cooley, in speaking of market reports contained in newspapers, said:

“As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character.”

Portions of the Brewer's Bulletin referring to the price of Pacific Coast hops and published on November 4th, 7th, 12th, 14th, 18th, 23rd and 27th, were read into the evidence by the Pabst Company in connection with the deposition of Rudolph Keitel. The quotations on

Pacific Coast hops on November 4th, 1912, reported by said Bulletin, were as follows (R. p. 211):

“1912 Pacific Coast Hops—

Oregons, strictly choice, free of mould.	23 at 24c
Yakimas, strictly choice.	24 at 25c
Mendocinos, strictly choice.	22 at 23c
Russian Rivers, strictly choice.	22 at 23c
Sonomas, strictly choice.	23 at 24c
Pacifics, medium to prime.	20 at 21c
Pacifics, lower grade, poor quality, mouldy	18 at 19c”

In all of the other published quotations read into the record at pages 213, 214, 215, 216, 217, 218, 221 and 222 the lowest prices of choice Pacific Coast hops quoted at the respective dates there indicated is in no single instance under the price stipulated by the contract in suit. We have quite exhaustively analyzed the evidence as to the Chicago market based upon actual transactions and upon reliable market reports, and in every respect the transactions at Milwaukee have been corroborated.

The trial court found in its sixth finding of fact (R. p. 20) that the hops in question had a market price in Milwaukee on November 4th, 1912. We submit that under the former opinion of this court the market price then prevailing based upon undisputed actual transactions in Milwaukee, must control. If the Milwaukee market price is to be determined by sales elsewhere, the law requires that we resort to *the nearest available and controlling market*. We have now shown that the Chicago market, like the Milwaukee market, exceeded

the contract price. No other market can possibly be used for measuring damages unless it be the base market on the Coast where hops of the character in question were grown and assorted and whence they were shipped and distributed.

SALES ON THE PACIFIC COAST.

E. Clemens Horst testified, viz.: (R. p. 58.)

“I bought a special lot of hops from Wolf, Netter & Company, about 100 bales of Consumnes in November, 1912, at *seventeen cents per pound*. I do not know of any sales of Consumnes hops outside of this one sale to us, and the hops that I sold of my own crop. (R. p. 61, 62.)

When I sold hops after November, 1912, for fourteen to seventeen cents, I knew Pabst sale was off.” (R. p. 62.)

Irving S. Marks, a commission dealer in hops for twenty years, buying and selling in the Sacramento market and all sections of California, testified as follows:

“I was familiar with the Sacramento hop market in 1912. In November the price was eighteen to nineteen cents f. o. b. Sacramento and *in order to get the price to a brewer in Milwaukee you would have to add the freight and buying and selling commission*. On November 4th, 1912, the market price of choice Consumnes hops in Milwaukee would be twenty-two to twenty-three cents. (R. p. 174-175.)

The market was pretty firm in November, 1912, for choice variety. I took deliveries of some choice Consumnes hops that we bought at eighteen and one-half cents. Mr. Spicer got them from the

Jacks people—about three hundred bales. (R. p. 177.)

I saw another lot of choice Consumnes hops bought in Sacramento about that time at nineteen cents a pound. (R. p. 178.)

Otto Koch, a farmer and hop dealer, in business for the last five or ten years in buying and selling hops on commission, testified:

“I dealt in hops all over the Sacramento section, Yolos, Consumnes, Wheatland and all kinds of California hops in the Sacramento market in the year 1912. (R. p. 183.)

I bought some choice Consumnes hops about November 4th, 1912, for nineteen cents a pound, and the market value at that time was nineteen cents a pound. I bought them for George Proctor, for Lilienthal, Faulk-Wormser & Company, E. Magnus Company. The price to the growers was from seventeen and one-half cents to nineteen cents a pound. (R. p. 183.)

I got an order to buy, in November, 1912, I think it was, 200 bales. The dealer's orders were to buy at certain figures in November. The lowest was seventeen and one-half cents, *but the only transaction I closed was for nineteen cents. During that month I bought over 1,100 bales of hops. In November and December, 1912, the price paid for them ranged from seventeen and one-half cents to eighteen cents and even nineteen cents a pound.*” (R. p. 184.)

John M. Spicer, with his principal place of business in Sacramento, was engaged in the hop buying business since 1890, and testified as follows:

“I was familiar with the price of choice Consumnes hops in the Sacramento market on November 4th, 1912, or thereabouts. *I bought three lots of hops at that time at eighteen cents. The market price at that time was seventeen and five-eighths cents to eighteen and one-half cents to the grower.*” (R. p. 184.)

P. C. Drescher, a merchant in the wholesale grocery line, was also engaged in the hop business for some forty odd years and had his headquarters at Sacramento. This witness testified:

“I am familiar with Consumnes hops ever since they were grown on the Consumnes River. I was familiar with the market for choice Consumnes hops in Milwaukee in November, 1912. (R. p. 228.)

The markets of the country are relative. The difference of the freight and transportation is practically the difference between the market prices. (R. p. 229.)

The market value of choice Consumnes hops on November 4th, 1912, or thereabouts, I would say was about twenty cents. (R. p. 229.)

There was a demand on the market for the best class of hops. I did not hear of any choice Consumnes hops selling for fourteen and one-half cents or fifteen cents. *I know of sales about that time. In November certain Wheatlands were sold. Choice Consumnes ran somewhat better than choice Wheatlands. The choice Wheatlands were selling at that time at nineteen cents f. o. b. Sacramento.* (R. p. 233.)

November sales were on inquiries made at that time and the sale made at the time of delivery, and they were not previously contracted for. (R. p. 234.)

Choice Consumnes ran on about a par with choice Sonomas." (R. p. 234.)

C. C. Sweeney bought about seven or eight hundred bales of Consumnes hops in the Sacramento market. (R. p. 126.)

E. Clemens Horst testified that he afterwards heard of the sale from Wolf, Netter & Company to Sweeney, at Sacramento, in November, 1912, at eighteen and three-fourths cents per pound, but he asserted that a commission of one-half to three-fourths cents a pound was paid in connection with this deal. (R. p. 62.) Even were this true, so that one-half to three-fourths of a cent must be deducted from the price of eighteen and three-fourths in order to arrive at the grower's price, these hops were bought by a dealer f. o. b. the Pacific Coast, and the dealer's profit must be added in order to arrive at the price, exclusive of freight, that the brewer or consumer in Milwaukee would have been required to pay on the basis of this sale.

The testimony introduced in the trial court by the Pabst Company in support of its defense meets every requirement of the rules of evidence as to market value. Actual sales and hop transactions were first shown in Milwaukee on the very day designated in the former opinion of this court as the date of delivery. These were sales of large quantities and were followed by sales at similar prices during the month. Next, to meet the possible contingency that the court would not find as it

did in fact that a market existed in Milwaukee, the Pabst Company showed, by undisputed evidence, the prices controlling all sales, of which any record could be obtained at Chicago, the next nearest available place where there was an actual market. Chicago sales confirm the accuracy of the prices recognized by the Milwaukee transactions. Lastly, the base market for Pacific Coast hops was appealed to. The current price shown to have been received by the grower in that market at the time in question for the quality of hops contracted for, again demonstrates beyond peradventure (when allowance is made for freight and the intermediary commissions between grower and consumer), the genuineness of the price controlling actual transactions in Milwaukee.

The opinion of this court which became the law of the case by which the trial court should have been guided, based upon the long established precedents, only reiterates the rule as to where and when market value must be determined.

MARKET VALUE.

“The market price must be determined as of the place of delivery, provided the goods have a market price at such place. If there is no market price at the place of delivery, the true value is to be shown by the best evidence possible, and in such cases the market price at other places, plus the expense of transportation to the place of delivery, may be used as a basis for computation; and if the market price in the vicinity of the place of delivery is shown

to depend on the market price at a large, well-known and active market, the market price at such place, plus transportation charges, must be considered."

35 Cyc., Sales, page 638;

National Warehouse & S. Co. vs. Toomey, et al. (Mo.), 129 S. W. 423;

Ebenreiter vs. Dahlman, 42 N. Y. S. 867, 871;

LaRue vs. St. A. & D. Elevator Co. (So. Dak.) 95 N. W. 292;

E. Tennessee & G. Ry. Co. vs. Hall (Ga.), 1 S. W. 620;

Western Assocn. vs. Studebaker (Ind.), 23 N. E. 1139;

Wigmore Evidence, Vol. I, Sec. 717;

Gray vs. MacDowell, 8 Wendall, 435;

2 Sutherland, Damages, 3rd Ed., Sec. 445, p. 1213;

Lincoln vs. Alshuler Mfg Co., 142 Wis. 475.

The contract was consummated by acceptance in Wisconsin and was to be performed in Wisconsin by delivery f. o. b. Milwaukee. The damages, therefore, are to be measured according to Wisconsin law.

17 Corpus Juris, damages, 719;

L. J. Mueller Furnace Co. vs. Meiklejohn, 121 Wis. 605;

State ex rel. News Pub. Co. vs. Park, 166 Wis. 386.

In the *Lincoln vs. Alshuler Mfg Co.* case *supra*, the court said, at page 484:

“The measure of damages, by the ordinary rule, is the difference between the amount (the vendee) agreed to pay for the goods *and the reasonable market value thereof at the agreed delivery point in Wisconsin at the time of the breach.* * * * That is subject to the exception that when there is no fair market value at the delivery point, such value may be determined at some other point just to both parties. * * *”

In *Birdsong & Co. vs. Marty*, 163 Wis. 516, the court held:

“*Market price is not an imaginary, fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question.*”

Market values are therefore only to be predicated upon actual transactions. When a person in a certain locality offers a commodity for sale at a price at which other parties, desirous of acquiring ownership in that property, are willing to pay, a sale necessarily follows. That proves the soundness of the principle that market value is not an imaginary or fictitious thing, for when prices quoted by willing sellers and the offers of persons ready to buy coincide, the result is a sale. Offers to sell or buy, not reciprocally attractive, must necessarily be unproductive of results. Evidence of a buyer's offer not resulting in a sale is not competent proof of market value. We must deal with actual transactions, not with

transactions which might have occurred if the seller had been of a different frame of mind. The witness Otto Koch testified (R. p. 183) that he had orders from dealers to buy at $17\frac{1}{2}c$ but that the only transaction which he closed was at 19c.

The preliminary demands of the sellers were doubtless as much above 19c as the offer of the buyers were below 19c. The 19c figure was the meeting ground at which the transfer occurred.

The witness, Flood V. Flint, testified to no transactions whatever but to mere unaccepted offers. (R. p. 273.) Such testimony is incompetent, is no evidence of market value and is particularly worthless when compared with complete and undisputed proof of the prices at which many sales of substantial quantities were actually made at the time and place in question.

Cobb vs. Whitsett, 51 Mo. App. 145;

Hammond vs. Decker (Tex.), 102 S. W. 453;

Goldstein vs. Arkell, 164 N. Y. S. 580;

Saxe vs. Penoke Lbr. Co. (N. Y.), 54 N. E. 14;

Sharp vs. U. S., 191 U. S. 341, 348.

The Horst Company was permitted over the Pabst Company's objection to introduce opinion evidence that throwing the quantity of hops specified in the contract upon the market would depress the market. This testimony was not competent

13 *Cyc. on Evidence*, 510.

Dana vs. Fiedler, 12 N. Y. 40; s. c. 62 Am. Dec. 130, in which the third headnote is, in part, as follows:

“* * * conjectural opinions of witnesses as to the probable effect of putting upon the market the quantity called for in a particular contract, in addition to the usual supply, can not be received.”

Upon well-settled principles of law reiterated in the former opinion of this court the measure of damages is the difference between the contract price and the market value at the time and place of delivery.

The place of delivery was Milwaukee and the time of delivery, as fixed by the former opinion, November 4, 1912.

The Horst Company produced no evidence of any sales at either Milwaukee, Chicago or on the Pacific Coast, except a single sale of 100 bales purchased by Horst from Sacramento dealers at 17c per pound. (R. p. 58.)

The undisputed evidence shows a number of sales of large quantities at Milwaukee during November at prices ranging from a cent below to a cent above the contract price.

Similarly, the evidence shows, without dispute, many transactions at Chicago involving transfers of large quantities of hops at prices identical with those obtaining in Milwaukee.

Finally, the base market on the Pacific Coast is found to be comparable with both Milwaukee and Chicago markets.

The court's finding that the market price at the time and place of delivery was 6c below the contract price of 20c determines the market price to be, at the time and place of delivery, only 14c per pound, exclusive of freight. This finding shows that the trial court excluded from its consideration the prices which, by the undisputed evidence, controlled actual market activities in both Chicago and Milwaukee. The finding of the court is diametrically opposed to the undisputed evidence of actual current prices. It follows that the trial court must have regarded such prime evidence as not pertinent and must have predicated its finding of market price upon (a) sales of small quantities of hops claimed to have been made by Horst at points remote from Milwaukee, concerning which this court said:

“Furthermore, the market value or price at Milwaukee, the place of delivery, was the criterion, and *these sales were made in many different states, and even in the Dominion of Canada. For these reasons the testimony offered was incompetent and irrelevant, and should have been excluded.*” (229 Fed. Rep. 919.)

or (b) the incompetent opinion evidence as to the depressing effect of throwing upon the Milwaukee market the quantity of hops specified in the contract.

A review of the testimony of Horst Company's three witnesses, E. Clemens Horst, F. W. George and Flood V. Flint, discloses no other possible basis for the court's finding of market price of 14c per pound. The witness Paul E. Peterson called by the Horst Company testi-

fied that he sold his hops in 1912 for 22c. (R. p. 115.) Certainly, Peterson's testimony affords no basis for the court's finding.

SECOND.

The finding that the Horst Company was able and willing to deliver the contract quantity (2,000 bales) of choice Consumnes hops is not supported by competent evidence.

This court, in its former opinion, held:

“The books themselves afforded the primary evidence of their contents, and as long as they were accessible and unaccounted for, any evidence as to what they contained or showed was secondary and incompetent. This rule is elementary. Furthermore, the books were not identified or proved, so as to render them competent, if offered. It appears from the compilations referred to that the books recorded transactions which took place in New York, Chicago and various other places throughout the United States, and there was not the slightest testimony as to how the books were kept, by whom they were kept, when the entries were made, or the sources from which they were made.”

The ability of the Horst Company to perform the contract was one of the issues. (229 Fed. Rep. 917.)

St. Louis & S. F. Ry. Co. vs. Herr, 193 Fed.
950.

The total quantity of hops grown by the Horst Company in 1912, of the contract quality, was 4,350 bales. (Bottom of R. p. 45.)

The amount sold prior to November 4, 1912, was 2,764 bales. (R. p. 156.) (Testimony of T. A. Farrel.)

The testimony of the Horst Company shows that subsequent to November 4, 1912, it sold only 1,503 bales, exclusive of pickouts, replacements and cutups. (R. pp. 72, 73, 74.)

The testimony upon which the court evidently based its finding is the general statement of Horst, predicated upon the contents of books which were not kept by him as to the quantity of hops which the Horst Company possessed available for delivery on or subsequent to November 4, 1912.

On the first trial the testimony of this witness was predicated upon a recollection of his books. This method of presenting facts derived from books without presenting or accounting for the books or producing the witness who made the entries was condemned by the former opinion.

The books were not produced at the last trial. General statements of the witness Horst, as to the ability of the Horst Company to make delivery, were admitted by him to be predicated upon his review of his previous printed testimony which, in turn, was predicated upon unproduced books. (R. p. 80.)

In *Campbell vs. Rice*, 22 Cal. App. 734, 736, the court said:

“We are referred to no authority and we know of none holding that a party to an action may copy a book of original entries in his possession withholding the original and prove his case by introducing such copy in evidence, while on the contrary numerous authorities hold such ruling to be error.”

See, also, *People vs. Whalen*, 154 Cal. 472, 474.

The testimony of Farrel stands upon a somewhat different ground, being in the nature of an admission on the part of the Horst Company.

The testimony of the witness Horst at the last trial was contrary on important points to his testimony on the first trial. Accordingly his entire testimony should be given little weight. At the last trial he testified as follows:

“We subsequently sent the defendant other samples Nos. 25 to 38. These samples compared with the samples 1 to 20 were the same general type and the same grade of hops. One of these samples is a part of a sample defendant sent to us. The sample was exactly like another sample that I had already sent them, which they had rejected, so as to have no question in my mind that they proposed to reject everything, *I sent them back one of the samples. I put it in a different package and sent it to them.*” (R. pp. 48, 49.)

On the former trial this witness testified:

“I took the four and matched up those hops identically so that nobody on God’s earth could tell the difference, and I sent them such a line of samples, and they even rejected those very samples. The Pabst people informed Mr. Gerber that I sent back the identical sample, but I did not.” (R. pp. 55, 56.)

CONCLUSION.

This action has been twice tried and, if possible, the litigation should now be terminated.

The record of the last trial shows that the judgment is grounded upon evidence held by the former opinion to be incompetent.

It is also demonstrable that if the trial court had measured the damages of the Horst Company by the market value of hops at the time and place of delivery, in accordance with the direction of the former opinion of this court, it would have necessarily found that the market price at such time and place was no lower than the contract price. Such finding would have called for judgment of dismissal.

The two successive judgments which have been entered in this action have resulted from a disregard of the plainest rules of law in respect to the character of evidence by which market value at the time and place of delivery is to be determined. The judgment now before this court is hostile to all of the competent evidence on the question of market value. Any attempt to de-

fend such judgment by resorting to the opinion evidence of witnesses who admit their lack of knowledge of the prices controlling actual sales on the pertinent markets, or, by resorting to evidence of the small sales made by the Horst Company at remote points near the Atlantic Coast, which evidence was condemned by the former opinion, must fail.

The Pabst Company has not been accorded a trial upon the evidence. Such evidence discloses no legitimate basis for the court's finding that the market price at Milwaukee on November 4, 1912, was 6c under the contract price of 20c per pound, exclusive of freight. (Finding VII, R. p. 20.) All actual sales in every market proper to be considered show the market price to have equaled or exceeded the contract price. The amount of damages found by the court results from applying a 6c per pound difference to the total weight of the bales, as set forth in Findings III and V. (R. pp. 18 and 20.)

The Pabst Company seeks only the vindication of its fundamental rights. It seeks to have this controversy decided upon competent evidence particularly as the competent evidence is most convincing of the true market value. The competent evidence is undisputed and will support only one finding. This court should, by its mandate, order the proper finding to be entered and the litigation ended.

The power to reverse includes the power to modify. Nothing can be gained by a new trial. The record

contains a full and undisputed showing of the prices at which actual sales of hops occurred in pertinent markets. Market price is fixed by such actual sales.

The mandate of this court should fix the true market price established by the competent evidence and direct the entry of judgment accordingly.

Respectfully submitted,

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